as a matter of law, entitled to recover the full value of the cargo. The Court of Appeal held that although in general where goods were delivered to a consignee, the consignee, as the owners of the goods, was the proper person to bring an action against the carrier for the loss or damage to the goods, the crucial issue where the right to sue was in question was not where the title and risk lay, but between whom was there privity of contract; the questions of title and risk were only relevant to determine the question of privity. Where the consignor could show that there was a special contract between himself and the carrier whereby the carrier had undertaken to receive the goods from the consignor and to deliver them to the consignee at a particular place, that was sufficient to establish the necessary privity on which the consignor could form an action for substantial damages for loss or damage to the goods without reference to the question whether at the time of the loss or damage, the consignor had the property in, or the right to possession of, the goods, or whether the goods were or were not at his risk. In dismissing the appeal, Roskill L.J. after referring to a series of authorities, stated at page 35 that: —

"I think *Dunlop* v. *Lambert*[6] and the cases referred to in the speech of Lord Cottenham LC justify the submission that the crucial question every time the right to sue was in issue was not where the title or the risk lay but between whom there was privity of contract. Only if there were privity of contract could the plaintiff sue. Questions of title and risk were relevant to determine questions of privity but when once privity was established neither title nor risk was a condition precedent to a successful claim for full damages if breach of contract and resultant loss and damage were proved."

At page 36 he said: —

"Our attention was also drawn to a decision of Shaw C.J. in the Supreme Court of Massachusetts, *Blanchard* v. *Page*,[7] where the learned chief justice seems clearly to have held, following *Joseph* v. *Knox*,[8] that once the bill of lading established privity, the carrier could not defeat the consignor's claim by alleging that the consignor had no interest in the goods and had suffered no loss."

In the same case at page 43 Ormrod L.J. expressed his view that: —

"In my judgment, therefore, the crucial question in this case is the effect of this triad of cases, *Davis and Jordan* v. *James*,[9] *Joseph v. Knox*[8] and *Dunlop* v. *Lambert*,[6] on the measure of damages which the present plaintiffs can recover in this action, assuming that at the date of the loss they had neither property in, nor right to possession of, the goods, nor the risk. *Davis and Jordan* v. *James*[9] is so briefly reported that it throws no light on this point. *Dunlop* v. *Lambert*[6] does not determine it unequivocally because in that case the plaintiff, Dunlop, had replaced at his own expense to the buyer the puncheon of whisky which had been thrown overboard by the shipowner and was attempting to recover his consequential loss. He, therefore, was in a position to prove that he personally had suffered damage. But *Joseph* v. *Knox*[8] is clear authority for the proposition that, where the plaintiff has personally entered into the contract of carriage but has no interest in the goods damaged during the voyage, he can recover from the shipowner in damages an amount equal to the diminution in value of the goods. In that case it was expressly admitted that the property in the goods had passed to the buyer in Surinam and it is clear that the plaintiff was not at risk. Lord Ellenborough said: —

'I think the plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owner.'

This decision was expressly approved by the House of Lords in *Dunlop* v. *Lambert*[6] without any reservations, so it is permissible to infer that their Lordships saw nothing anomalous in Joseph and others recovering substantial damages in respect of a loss which did not, in fact, fall on them. This is therefore a strong authority in counsel for the plaintiffs' favour, and, having been approved by the House of Lords, is binding on us unless there are other authorities to the contrary."

In the light of these authorities, I am of the opinion that in default of appearance judgment ought to be entered for defendants before a reference to the Registrar for assessment of quantum of damages could be made. Even assuming that the Registrar could decide on liability he was clearly wrong to insist that appellants as consignor must establish that the property or right to possession of the goods was on appellants. In this case the proper course for this court to do is to give judgment for appellants in default of appearance and to send the case back to a Judge of the High Court for assessment of quantum of damages. I so order.

Appeal allowed with costs.

Ali Ag C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal allowed.

Solicitors: *Chang & Vello.*

BANGKOK BANK LIMITED v. WIEL BROTHERS COTTON INC.

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) May 19, 1977]

[Penang — Federal Court Civil Appeal Nos. 33 and 34 of 1976]

Practice and Procedure — Judgment of High Court of Justice in England — Execution of judgment — Seizure of cargo alleged to belong to judgment debtor — Writ of Seizure and Sale — Injunction — Intervention by bank claiming to be pledgees of goods — Interpleader proceedings — Security for costs — Proper way of seizing ship or cargo — R.S.C., 1957, O. 5 rr. 16 and 17, O. 9 r. 8, O. 29, O. 41A r. 15, O. 43, r. 3, O. 57 rr. 9 and 12, O. 65 rr. 1 and 6A.

Shipping — Proper way of seizing cargo or ship — Arrest — R.S.C. 1957, O. 5 rr. 16 and 17, and O. 29.

Banking — Bill of lading — Banker's lien — Implied pledge.

In this case Wiel Brothers had obtained awards in England from arbitrators in their favour against Thai Industries. Leave was obtained in England to enforce the awards as judgments or orders to the same effect. Wiel Brothers subsequently applied for registration of the English judgment and for an injunction restraining Thai Industries in respect of a cargo of bales of cotton expected to arrive in Penang. Subsequently they took out a writ of seizure and sale in respect of the bales of cotton. The Bangkok Bank asked for leave to intervene in the proceedings and asked that the bales of cotton be released to them, as they held the relevant bills of lading and the bills of lading were "to the order of Bangkok Bank Ltd." An interpleader summons was subsequently taken out and the learned trial judge considered that that was the best way to decide the ownership of the goods. Pending determination of the interpleader summons he ordered —

(a) that the bank's application to release the goods be unconditionally dismissed;

(b) upon the bank providing a bank guarantee for the sum of $407,000 plus 10% the bales of cotton be released to them;

(c) in the event of the bank not providing the guarantee and taking possession of the cotton within two weeks of the date of the order the sheriff to proceed with the sale of the cotton and all proceeds of sale to be deposited in court;

(d) that on the interpleader summons, the bank to be plaintiffs and Wiel Brothers, be defendants, and that they do file the statement of claim and the defence respectively.

The Bangkok Bank appealed to the Federal Court.

Held: (1) the application of the appellants was for leave to intervene. The proper way to contest ownership is by way of interpleader proceedings and therefore in this case the learned trial judge was right in deciding that the best way to determine the ownership of the goods would be under the interpleader summons;

(2) as the goods had been sold, the effect of the various orders had been spent but his orders that the appellants be plaintiffs and Wiel Brothers defendants and asking them to file statement of claim and defence would stand;

(3) where a ship or her cargo was to be seized the proper procedure would seem to be by way of arrest. Thus it would appear that the goods in this case were not properly seized as a result of the action of Wiel Brothers who may be liable to damages to the appellants if the bank succeeds in establishing its rights to the goods.

Cases referred to:-

(1) *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johore & Ors.* [1974] 2 M.L.J. 45.

(2) *Aeronave SPA & Anor.* v. *Westland Charters Ltd. & Ors.* [1971] 3 All E.R. 531 and 533.

(3) *Tucker* v. *New Brunswick Trading Company of London* (1890) 44 Ch. D. 249.

(4) *Maythorn* v. *Palmer* 11 LT. 261.

(5) *Hudson Strumpffabrik G.m.b.H.* v. *Bentley Engineering Co. Ltd.* [1962] 3 All E.R. 460.

(6) *New Malaya Co. Ltd.* v. *Abu Bakar* [1961] M.L.J. 151, 152.

(7) *Jelks* v. *Hayward* [1905] 2 K.B. 460.

(8) *Rogers* v. *Kennay* 9 Q.B. 592.

(9) *North Western Bank* v. *John Poynter, Son and Macdonalds* [1895] A.C. 56, 72.

(10) *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise* [1963] 1 Ll.L.R. 81, 85.

(11) *The Makefjell Kitchens of Sara Lee (Canada) Ltd.* v. *A/S Falkefjell* [1975] 1 Lloyd's Rep. 528.

(12) *The Cap Blanco* [1913] P. 131, 136.

(13) *Pena Copper Mines Ltd.* v. *Rio Tinto Co. Ltd.* (1911) 105 L.T. 846.

(14) *Jones* v. *Oceanic Steam Navigation Co. Ltd.* [1924] 2 K.B. 730.

(15) *Globus Shipping and Trading Co. (Pte) Ltd.* v. *Taiping Textiles Bhd.* [1976] 2 M.L.J. 154, 156.

FEDERAL COURT.

Lim Kean Chye for the appellant.

R. Kumarasamy (Miss) for the respondents.

Lee Hun Hoe C.J. (Borneo) & Ag. L.P. (read by Raja Azlan Shah F.J.): This appeal is against the decision of the learned judge in respect of certain orders made in connection with two cases which, for convenience, would be dealt with together. The main ground is against the issuance of the injunction and the writ of seizure and sale. Also, for convenience, any reference to the Appeal Record will be to No. 33 of 1976 except otherwise stated.

Plaintiffs/respondents ("Wiel Bros.") are Wiel Bros. Cotton Inc. (also trading as H.H. Lawler & Co.), a company incorporated under the laws of the State of Delaware, U.S.A., and having their principal place of business at P.O. Box 100, Montgomery, Alabama, U.S.A. Defendants ("Thai Industries") are Thai Industries Development Co. Ltd. of 264, Raja Wongse Road, Bangkok, Thailand. Appellants/Intervenors ("Bangkok Bank"), the Bangkok Bank Ltd. had, on the application of "Thai Industries", opened an irrevocable commercial letter of credit for US$158,733 in favour of Newcot Ltd. of Switzerland for shipment of 939 bales of raw cotton from Germany to Bangkok. The cotton was shipped by s.s. "Havelland" from Brema, Germany to Bangkok under a bill of lading dated August 28, 1975 "to the order of Bangkok Bank Ltd."

"Wiel Bros." and "Thai Industries" had entered into four agreements in 1973 in England for the purchase and sale of cotton. Following certain differences arising out of the agreements certain arbitrators were duly appointed under the agreements. The arbitrators made four awards on various dates in 1975 in favour of "Wiel Bros." Pursuant to section 26 of the English Arbitration Act, 1950 "Wiel Bros." applied for leave to enforce the awards in the same manner as a judgment or order to the same effect. This was granted and thus "Wiel Bros." obtained judgment against "Thai Industries" in the Queen's Bench Division of the High Court of Justice in England on September 25, 1975 in respect of the four awards totalling US$147,432 with costs and interests amounting to £1,100. Knowing that s.s. "Havelland" would arrive on or about September 30, 1975 at Penang, carrying, among other goods, 939 bales of cotton alleged to be the property of "Thai Industries", "Wiel Bros." sought registration of the English judgment in the High Court in Malaya pursuant to section 4 of the Reciprocal Enforcement of Judgments Act, 1958.

So, on September 29, 1975 "Wiel Bros." applied *ex parte* to the High Court at Penang for four orders which were granted. These orders were for (i) registration of the English judgment; (ii) service out of jurisdiction on "Thai Industries"; (iii) service of notice of registration of the English judgment on "Thai Industries"; and (iv) an injunction restraining "Thai Industries", their servants or agents or any person or persons currently in possession, custody or control of the 939 bales of cotton on board s.s. "Havelland" expected to reach the port of Penang.

When the process server tried to serve the injunction order on the captain of the s.s. "Havelland" the latter refused to acknowledge receipt of the document and stated that the order had no effect on him. As a result "Wiel Bros." applied on October 1, 1975 for an order to the effect that s.s. "Havelland" could not sail out of Penang as long as the captain failed to comply with injunction order in unloading the 939 bales of cotton from the vessel. The injunction order was subject to "Wiel Bros." giving the usual undertaking as to damages.

On October 18, 1975 the shipowners were given leave to intervene but their application to set aside the orders obtained on September 29, 1975 was dismissed. They had taken no further interest in the proceedings. On October 20, 1975 "Wiel Bros." took

out a writ of seizure and sale in respect of the 939 bales of cotton on board the vessel. The next thing that happened was that "Bangkok Bank" came on the scene. On October 24, 1975 they took out a summons in chambers (page 78 of Appeal Record) and applied for the following orders that: —

(1) The applicant may be given leave to intervene in these proceedings.

(2) The Order of Court dated the 29th day of September, 1975 be set aside.

(3) The 939 bales of cotton be released to the applicant.

(4) Alternatively the plaintiffs may be ordered to provide a bank guarantee in favour of the applicant the said Bangkok Bank Ltd.

(5) Such other relief as the Honourable Court shall deem just.

(6) Costs of and occasioned by this application may be provided for.

On November 10, 1975 leave to intervene was granted and other matters were adjourned to December 1, 1975 and then to December 15, 1975. During the adjournments the parties negotiated on the terms of the guarantees. "Wiel Bros." were prepared to give a limited guarantee. "Bangkok Bank" indicated that they were prepared to give a guarantee for the invoice price of the goods plus 10%. However, it seemed that the parties were unable to reach agreement on the type of guarantee. Consequently, the learned judge made an order that upon the "Bangkok Bank" giving a bank guarantee for $407,000 plus 10% to "Wiel Bros." the 939 bales of cotton would be released to them and the order of injunction be discharged. Further argument in open court was granted and heard on January 1, 1976 and three separate days in February 1976. During the hearing "Bangkok Bank" challenged the propriety of the arbitration awards, the merits and the registration of the English judgment. All these contentions were, with respect, rightly rejected by the learned judge as completely irrelevant to the issue before him. In delivering his judgment the learned judge said at page 118 of the Appeal Record: —

"It was quite clear from the Affidavit-in-Support of the Bangkok Bank's Application that their only interest was in the goods, i.e. the 939 bales of cotton on board the ship 'Havelland' which they claimed the ownership of. They had no right to intervene nor any interest in the suit by the plaintiffs against the defendants for the sum of US$147,432. Therefore the only Order they had any interest in was the order of injunction. However by the time this application came up before me on the 10th of November 1975 the goods had been seized under a Writ of Seizure & Sale."

As an interpleader summons had been issued on November 17, 1975 the learned judge considered that that was the best way to decide the question of ownership of the goods. Therefore, pending determination of the interpleader summons he ordered as follows: —

(1) That the applicants' application to release the goods is unconditionally dismissed;

(2) Upon the Bangkok Bank providing a bank guarantee for the sum of $407,000 plus 10% the 939 bales of cotton be released to them;

(3) In the event of the Bangkok Bank not providing the guarantee and taking possession of the cotton within two weeks of the date of the Order the Sheriff to proceed with the sale of the cotton and all proceeds of the sale to be deposited in court;

(4) That the applicant's application for sampling of the cotton for sale be approved in the event of Bangkok Bank not taking possession of the goods;

(5) That, on the Interpleader Summons, the Bangkok Bank to be plaintiffs and Wiel Bros. be defendants. Statement of Claim to be filed within one month and Defence to be filed one month after the above period.

(6) Parties were given liberty to apply and costs in the cause.

The various orders were applied for *ex parte* on the same day, *i.e.* September 29, 1975 in a rather hasty fashion. This applies equally to subsequent orders. Consequently, orders made disclosed certain unsatisfactory features and were irregular. Take the summons in chambers (page 26 of the Appeal Record) which reads: —

"Let all parties concerned attend before the judge in Chambers on Monday September 29, 1975 at 9.30 o'clock in the forenoon for an Order and Directions that the defendants Thai Industries Development Co. Limited by themselves, their officers, agents or servants or any person or persons currently in possession custody and/or control of the goods of the said defendants laden on board the vessel named 'S.S. Havelland' arriving at the port of Penang on or about September 30, 1975 enroute to Bangkok, Thailand or any of them or otherwise be restrained by injunction from removing the said goods or any part thereof out of jurisdiction of this court or from selling, transferring or otherwise parting with or disposing of the said goods or any part thereof within the jurisdiction of this court until further order."

It is the contention of "Bangkok Bank" that the application is peculiar and that there should have been a writ or the application made under the Debtors Ordinance. "Wiel Bros." are general creditors on sum owing which has nothing to do with the cargo. On the other hand, "Bangkok Bank" lent money to "Thai Industries" to buy the cargo, and held the bill of lading as consignees. The general creditors could not just come in and take away the cargo. They had not proved ownership of the cargo. Judgment creditors can only step into judgment debtors' shoes: *Temenggong Securities Ltd. & Anor.* v. *Registrar of Titles, Johore & Ors.*[1] In any case the shipowners were not agents or servants of "Thai Industries". The injunction was granted in the following terms:

"*IT IS ORDERED AND DIRECTED* that the defendants Thai Industries Development Company Limited by themselves, their officers, agents or servants or any person or persons currently in possession custody and/or control of the goods of the said defendants laden on board the vessel named 'S.S. Havelland' arriving at the Port of Penang on or about September 30, 1975 en route to Bangkok, Thailand or any of them or otherwise, be restrained by injunction from removing the said goods or any part thereof out of the jurisdiction of this court or from selling transferring or otherwise parting with or disposing of the said goods or any part thereof within the jurisdiction of the court until the execution of the judgment dated September 29, 1975 of the Queen's Bench Division of the High Court of justice in England and registered in the High Court in Penang under Order of court dated September 29, 1975 pursuant to the Reciprocal Enforcement of Judgments Act 1958 or until further ordered *AND IT IS ALSO ORDERED* that the said goods be unloaded from the said vessel at the Port of Penang and be in the custody of the Bailiff of the High Court, Penang."

The summons in chamber shows clearly that the judgment creditors never asked for unloading of the goods. Yet, this was included in the order. The whole intention of "Wiel Bros." was to seize the goods on board without making all concerned parties. Neither does the summons in chambers refer to "until the execution of the judgment". This is strange as the goods were under execution. Counsel for "Wiel Bros." stated that the unloading of the cargo was approved as a result of her draft. A minute was submitted to the court. I do not think that was the proper way to have such important matter or matters inserted into the order. An injunction is an interlocutory order normally made pending a trial but there was no trial pending at all. The main object of an injunction is to restore the *status quo* or to preserve the assets. "Wiel Bros." were in any event not without remedy in Thailand. It is of utmost importance that the court should not be misled by counsel. A registrar should be most careful when vetting a draft order. Nothing ought to be inserted into the order which has not been applied for and granted by the learned judge.

Another application by summons in chambers dated October 1, 1975 was to restrain Government officers from authorising or giving port clearance to the ship. An order dated October 2, 1975 was obtained which stated that: —

"*IT IS ORDERED AND DIRECTED* that the Senior Assistant Director of Customs, Butterworth, or his servants or agents, the Harbour Master, Harbour Master Office, Pulau Pinang or his servants or agents and the Senior Boarding Officer, Port Office, Pulau Pinang or his servants or agents be restrained from authorising or giving the necessary port clearance required to enable the 'S.S. Havelland' to sail out of Penang so long as the captain/master of the said vessel by his servants or agents as being the person or persons currently in possession custody and/or control of the goods of the defendants, Thai Industries Development Company Limited i.e. 939 bales of U.S.S.R. raw cotton laden on board the said vessel 'S.S. Havelland', has neglected and/or failed to comply with the order of court dated September 29, 1975 (Enclosure 10) in unloading the said goods from the said vessel at the Port of Penang."

"Bangkok Bank" objected to the application because it was wrong to involve Government officers. The proper course was for "Wiel Bros." to use arrest procedure. The learned judge was misled by "Wiel Bros." into believing that there would be "irreparable damage". Those suffering such damage were "Bangkok Bank" and the shipowners. The Specific Relief Act was not brought to the notice of the learned judge. Section 54(d) of the Act clearly provides that an injunction cannot be granted to interfere with the public duties of any department of any Government in Malaysia. The co-operation of these Government officers could be obtained by other means without the order if it was necessary.

The arrest procedure gives a plaintiff security for his claim. In England before arrest an undertaking must be given and the marshal's fees and expenses paid. Various precautions involving expense may be taken by direction of the marshal to keep the vessel within the jurisdiction. In addition, steps will have to be taken to stop customs clearance and warn harbour authorities in the course of a normal arrest.

The application for injunction was supported by the affidavit of Rajaswary Kumarasamy who is also counsel for "Wiel Bros." (page 27 of Appeal Record). By paragraph 4 she affirmed that on instructions of "Wiel Bros." through their solicitors an order was sought to levy execution "upon the goods belonging to the defendants." Paragraph 5 indicates that "Wiel Bros." are general creditors for a general sum. This has nothing to do with the cargo on board. Paragraph 6 states that from information received it is believed that the 939 bales of cotton on board are the property of "Thai Industries." Better proof should be asked for before any order was made. By paragraph 9 it is stated that if the 939 bales of cotton are removed out of jurisdiction "Wiel Bros." would suffer grave injustice and may never recover the judgment debt. There is no question of grave injustice as the courts in Thailand are just as capable in dealing with the matters. In reply to the said affidavit Hartwig Schulze-Eckardt representing the shipowners affirmed (page 55 of the Appeal Record) by paragraph 3 that the period for setting aside the registration of the English judgment had not expired so that it was premature for "Wiel Bros." to take any action. Further, "the consignee of the 939 bales of cotton is not the party to the originating summons and has nothing to do with the plaintiffs or the defendants as therein named." According to the ship's manifest the 939 bales of cotton were shipped by Controll Co. m.b.h. Zwaigniederlassungf Bremen and consigned to the order of Bangkok Bank Ltd. of Thailand. The manifest was annexed to the affidavit and marked "A" (page 57 of the Appeal Record). Paragraph 5 refers to the bill of lading and points out that the ship has a lien on the goods in respect of expenses and charges arising out of the court order. Further, by paragraph 6 it is stated that no undertaking has been given by "Wiel Bros." to pay any damages, expenses, costs and losses that might be sustained by the ship in complying with the court order. The bill of lading has nothing to do with the judgment creditor. It concerns the ship and the bank. The ship has a lien which must be respected.

The application of "Bangkok Bank" for leave to intervene was supported by the affidavit of Praphode Smithinunt, Vice President of the said bank. Paragraph 3 states that "Thai Industries" in the normal course of banking business applied for the issuance of the usual commercial credit in favour of a firm in Switzerland for shipment of 939 bales of cotton. A copy of the application was annexed (page 62 of the Appeal Record). In making application for commercial credit "Thai Industries" stated that "And further I/we agree that all goods covered by such draft or drafts shall remain in your possession until such draft or drafts shall have been paid by me/us and I/we highly hypothecate and pledge the said goods to you as security."

Counsel for "Bangkok Bank" submitted that the learned judge had no jurisdiction to make such order against the ship. Even if the goods belonged to the debtors they could not be seized in the way it was done. The goods could only be seized by way of arrest.

"Bangkok Bank" asked for security for costs but this was refused by the learned judge. Order 65 rule 1 gives the court a discretion as regards question of costs.

Aeronave SPA & Anor. v. *Westland Charters Ltd. & Ors.*;[2] *Tucker* v. *New Brunswick Trading Company of London*[3] and *Maythorn* v. *Palmer*[4] were cited to show the usual practice of English Courts to make foreign plaintiffs give security for costs. This is done as a matter of discretion as it is just to do so. In a short judgment in *Aeronave's case*[2] Lord Denning M.R. put the position clearly in these words: —

"So it comes to this: in this particular case, is it just or not to order security? Counsel for the plaintiffs says that the Italians were forced to come to this country because of this stipulation which Westlands had put in the contract that the claims were to be brought in English courts. Seeing that the Italians were forced to come here, he says that it is unfair that they should be put to the added burden of providing security. But in answer, counsel for defendants referred very helpfully to the decision of Mocatta J., in *Hudson Strumpffabrik G.m.b.H.* v. *Bentley Engineering Co. Ltd.*[5] Many arbitration agreements provide for arbitration in England; but that has never been considered to be a ground for refusing to order security for action to be brought in England. So here, the stipulation is not in itself any ground for refusing to order security.

Next, counsel for the plaintiffs says that it is a matter of chance who started these actions. The same issues will have to be fought out both in the English companies' action and in the Italian company's action. The answer is simple. The Italian concerns did start first. The English companies may win that action and get an order for costs, which they wish to enforce. Then, in the other action, the English companies are entitled to look, not only to the Italian company, but also to the guarantors. They may get nothing from the Italian company, but only get their money from the guarantors. In these circumstances, it seems to me that if and insofar as the Italians want to pursue this claim separately in this country, they should be ordered to give security for costs. I think, therefore, that the judge was right in ordering security in the sum."

The local practice is the same. In *New Malaya Co. Ltd.* v. *Abu Bakar*[6] defendant sought an order under Order 65 rule 6A that plaintiff be ordered to provide security for costs. Plaintiff was a company. At first in chambers Adams J. refused the application but changed his mind after hearing further argument in open court. He came to the conclusion that: —

"Since therefore it has been established that the plaintiff is resident in Singapore out of the jurisdiction and since the normal practice where the plaintiff is resident abroad is to order the plaintiff to give the defendant security for costs the application must be granted and the plaintiff must pay the costs."

"Bangkok Bank" may not be party to the original summons but they have been granted leave to intervene. They were compelled to come in as they were the holder of the bill of lading in respect of the goods seized. It can be said that the goods were seized *in transitu*. "Wiel Bros." alleged that the goods belonged to the judgment debtors "Thai Industries." However, "Bangkok Bank" may succeed in establishing their claim to the goods either as consignees or pledgees in which case they would be entitled to the proceeds of sale and to costs and probably to damages as well. As "Wiel Bros." chose to levy execution on goods on board the vessel in this country they should in fact have been asked to provide an undertaking and to pay expenses if the proper procedure of arrest were followed. The usual undertaking was given when the injunction was granted. This might be one of the reasons inducing the learned judge to refuse security for costs. The question of costs will probably come up again in the interpleader proceedings. As both parties are foreign concerns this question is somewhat important to them, particularly to the one who succeeds in the claim to the goods.

It was submitted that the writ of seizure and sale was bad in that the goods having been taken and stored were in the sheriff's custody. That is to say, in effect, the sheriff was seizing his own property. The bailiff acted under the direction of the sheriff. At common law a sheriff who seizes and sells goods not belonging to the judgment debtor makes himself liable in conversion to the owner. *Jelks* v. *Hayward*.[7] Under the heading of Execution — debtor's goods on pledge, *Mather* on Sheriff and Execution Law, 3rd Edition, page 96 expresses the view that: —

"Under an execution against the goods of A., the Sheriff cannot seize goods which he has deposited with another person as security for a debt. *Rogers* v. *Kennay*."[8]

Halsbury's Laws of England, 3rd Edition, Vol. 16 page 51 paragraph 78 indicates when a sheriff may seize goods "... but goods seized under ... pledged ... and which are held to the order of persons lending money to the judgment debtor, cannot be seized, unless, perhaps the advances are paid off by the execution creditor." *Halsbury's* Laws of England, 3rd Edition, Vol. 29 page 222, paragraph 427 repeats *Mather* in modern form when it states:—

"Where judgment has been obtained against the pawner of goods and execution has issued thereon, the sheriff cannot seize the goods pawned unless he satisfies the claim of the pawnee."

In the bill of lading "Thai Industries" made certain pledge which was referred to earlier on (page 62 of Appeal Record). The pledge began to run from the time the bill of lading was issued. The contract of pawn or pledge is a sort of bailment. The same volume of *Halsbury's* Laws of England at page 211 paragraph 391 describes the general characteristics of a pawn or pledge and states that: —

"Pawn has been described as a security where by contract a deposit of goods is made a security for a debt and the right to the property vests in the pledgee so far as is necessary to secure the debt; in this sense it is intermediate between a simple lien and a mortgage which wholly passes the property in the thing conveyed."

In *Halsbury's* Laws of England, 4th Edition, Vol. 3, page 63, paragraph 83 it is stated that: —

"The banker's lien is something more than an ordinary lien; it is an implied pledge."

At page 111, paragraph 150 it is provided that: —

"If the issuing banker accepts the bill drawn by the buyer or other beneficiary of the credit on the drawer's undertaking to forward bills of lading (which would be rare), the banker acquires an equitable claim to the bills of lading, valid against the customer's trustee in bankruptcy, but not against a third person who took them in good faith, and for value."

Page 123, paragraph 174 refers to the position of the bank in respect of the goods pledged as security as follows: —

"A banker may advance money on the security of goods or of documents of title to goods otherwise than by the acceptance of documentary bills or payment pursuant to an irrevocable credit.

If his customer is the real owner of the goods and entitled to the documents, the transaction amounts to a pledge of the goods, with the resulting rights of a pledgee, or may give rise to an equitable charge. Neither goods nor documents of title thereto being negotiable, the banker's title as pledgee at common law must depend on that of the pledgor. A banker paying or accepting pursuant to an irrevocable credit becomes pledgee of the documents of title accompanying the draft."

In *North Western Bank* v. *John Poynter, Son & Macdonalds*[9] the pledgors of a bill of lading representing a specific cargo were under contract to sell a larger quantity of like goods to third parties. The pledgees returned the bill of lading to the pledgors to obtain delivery of the merchandise and sell on the pledgees' behalf, and account for the proceeds towards satisfaction of the debt. The House of Lords held that the pledgees' security was not affected, and they were entitled to the proceeds of the cargo as against the diligence of general creditors of the pledgors. It was also held that the Law of Scotland is the same as the Law of England that a pledgee may redeliver the goods to the pledgor for a limited purpose without thereby losing his rights under the contract of pledge. Lord Herschell L.C. said at page 72: —

"It seems to me, therefore, upon the whole that the right of the bank to these goods was continuous, that it was still effectual at the time of the delivery to Messrs. Cross & Co., that it was effectual at the time when this arrest of the price was made, and that a creditor of Page could not in Scotland any more than in England insist that that was a debt due from Cross to Page which he had a right to arrest as being a creditor of Page."

"Bangkok Bank" relied on this passage which they submitted were on all fours with the present case. Here the "Bangkok Bank" had not parted with the bill of lading. "Bangkok Bank" said they were the pledgees. The diligence of the general creditors cannot defeat the right of the pledgees to the proceeds of the cargo.

In *Barclays Bank Ltd.* v. *Commissioners of Customs and Excise*[10] some 200 washing machines were seized in execution by the sheriff at the instance of defendants who obtained judgment against Bruitrix for arrears of purchase tax in the sum of £475. Bruitrix the holder of two bills of lading in respect of the machines deposited the bills of lading with plaintiffs as security for certain loan. Therefore, plaintiffs, as holders of a pledge on the two bills of lading, claimed possession of the machines. Diplock L.J. said at page 89 that: —

"So long as the contract is not discharged, the bill of lading, in my view, remains a document of title by indorsement and delivery of which the rights of property in the goods can be transferred. It is clear law that where a bill of lading or order is issued in respect of the contract of carriage by sea, the shipowner is not bound to surrender possession of the goods to any person whether named as consignee or not, except on production of the bill of lading (see *The Stettin*, (1889) 14 P.D. 142). Until the bill of lading is produced to him, unless at any rate, its absence has been satisfactorily accounted for, he is entitled to retain possession of the goods and if he does part with possession he does so at his own risk if the person to whom he surrenders possession is not in fact entitled to the goods."

Order 9 rule 8 which relates to service on corporations within the Federation should not have applied to "Thai Industries." Futher, Order 41A rule 15 provides that "any party desirous of issuing execution on a judgment registered under the Act must produce to the proper officer an affidavit of the service of the notice of registration." This was not complied with. It was submitted the whole procedure in this case was wrong. The sheriff flouted Order 43 rule 3 which says that "where the property to be seized consists of goods and chattels in the possession of the judgment debtor, the sheriff shall take the same into his custody." The goods were never in the possession of the judgment debtor. So, appellant said how could the sheriff seize the goods.

The writ of seizure and sale is at page 6 of Appeal Record No. 34 of 1976. Appellant submitted that the sheriff had issued a wrong writ. The writ also states that the property to be seized "shall be identified by or on behalf of Wiel Bros. Cotton Inc. as belonging to Thai Industries Development Co. Limited...." The contention of appellant is that this is all wrong. The 1960 Annual Practice provides the appropriate form under Appendix H.

It was further submitted that as regards the writ of seizure and sale we should not look to English law but our own law. Order 57 rule 12 of our Rules of Supreme Court states that:

"12. When goods or chattels have been seized in execution by a sheriff or other officer charged with the execution of process of the High Court, and any claimant alleges that he is entitled, under a bill of sale or otherwise, to the goods or chattels by way of security for debt, the court or a judge may order the sale of the whole or a part thereof, and direct the application of the proceeds of the sale in such manner and upon such terms as may be just."

Further, it was contended that jurisdiction is purely a question of law not necessitating any determination on any issue. Order 57 rule 9 of the Rules of the Supreme Court reads: —

"9. Where the question is a question of law, and the facts are not in dispute, the court or a judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the court. If a special case is stated, Order XXXIV shall, as far as applicable, apply thereto."

What has been done may be irregular but that does not mean the court has no jurisdiction. The important question is who has the better right to the goods.

In her submission counsel for respondents stressed that the bill of lading was entered into between appellant and the shipping company. Both parties were outside jurisdiction. Further, both agreed that the "bill of lading contract shall be governed by German law." It was, therefore, submitted that the court would have to decide on the proper law applicable to the contract before looking into appellants' claim. *Halsbury's* Laws of England, 3rd Edition, Vol. 7 page 72 paragraph 137 states that: —

"Apart from the formal validity of a contract, its essential validity, its interpretation and effect, and the rights and obligations of the parties to it, are governed (with certain exceptions) by the law which the parties have agreed or intended shall govern it, or which they are presumed to have intended. This law is generally known as the proper law of the contract."

Paragraph 138 of the same volume states: —

"Where the parties expressly stipulate that the contract shall be governed by a particular law, that law will be the proper law of the contract, provided the selection is *bona fide* and there is no objection on the grounds of public policy, and, apparently, even where the law has no real connexion with the contract."

Reference was made to *Halsbury's* Laws of England Monthly Review August, 1975 under E1362e on Bills of Lading. There plaintiffs shipped frozen bakery products on board defendant's ship for carriage to London and delivery there to plaintiffs' order. The bill of lading provided that "any claim against the carrier shall be decided at the principal place of busi-

ness of the carrier and in accordance with the law of that place." The cargo arrived in London and after part of the cargo was unloaded difficulties arose as to the discharge of the balance and a large number of cases were left in an unrefrigerated shed and damaged. Plaintiffs brought two actions in England against defendants, one *in rem* and the other *in personam*. Defendants objected that under the bills of lading the claims should be decided in Oslo. Held, giving judgment for defendants, the plaintiffs' claim was in substance and reality a claim arising under the bills of lading and was one which the parties had agreed should be decided in Oslo in accordance with the law of Norway. In the circumstances the plaintiffs had failed to show sufficiently strong reason why they should not be held to their contract. *The Makefjell, Kitchens of Sara Lee (Canada) Ltd.* v. *A/S Falkefjell.*[11] Dictum of Sir Samuel Evans P. in *The Cap Blanco*[12] applied. Two cases on the same point reported in *English and Empire* Digest Replacement Volume U (1975) were also cited. They are *Pena Copper Mines Ltd.* v. *Rio Tinto Co. Ltd.*[13] and *Jones* v. *Oceanic Steam Navigation Co. Ltd.*[14]

So far all the cases cited referred the parties to a bill of lading. Here we are not concerned with the parties to a bill of lading but between one "Bangkok Bank" one of the parties to the bill of lading and the general creditors "Wiel Bros."

A distinction must be made between the proper law of contract and the proper law of jurisdiction. The parties may have agreed that a bill of lading shall be governed by German law or Spanish law for that matter but that does not mean that no action could be initiated here. It is then a matter of discretion for the court whether or not to adjudicate on claim. Thus, in *Globus Shipping & Trading Co. (Pte.) Ltd.* v. *Taiping Textiles Bhd.*[15] Gill C.J. (Malaya) after referring to various authorities explained the position in these words: —

"It would seem abundantly clear from the authorities that where a cause of action in respect of any dispute in relation to a contract arises and is therefore properly within its jurisdiction, the court has a discretion whether or not to adjudicate upon the claim in the action even where the parties have agreed to refer such dispute to a foreign court, and that the question of jurisdiction is quite separate from the question of the proper law of the contract to be applied."

As regards the injunction respondents said it had lapsed when the goods were held by the sheriff. In *Halsbury's* Laws of England, 3rd Edition, Vol. 22, page 468, paragraph 923 under the heading of willingness to bring subject matter into court it is stated that: —

"A sheriff is usually ordered to sell the goods seized and pay the proceeds into court unless the claimant pays their value into court or gives security for that amount."

Halsbury's Laws of England, 3rd Edition, Vol. 21, page 398, paragraph 829 states: —

"An injunction may be obtained in a proper case to restrain the sale, assignment or alienation of property notwithstanding that a principal party interested is out of the jurisdiction."

But this does not preclude appellants from challenging the validity of the injunction as well as the seizure bearing in mind that the orders were obtained *ex parte*.

Atkin's Court Forms, 2nd Edition, Vol. 19, page 34, paragraph 14 states that: —

"If a writ of execution is irregular any party interested may apply by summons or motion to set it aside. The application must be made within a reasonable time and before the party applying has taken fresh step after becoming aware of the irregularity."

Respondents submitted that the learned judge was right to say that the matter should be tried under the interpleader summons. Appellants' claim was not as conclusive as contended. The claim could be defeated. *Atkin's* Court Forms, 2nd Edition, Vol. 22, page 305, paragraph 16 under the heading of issue it is stated that: —

"Where all the parties appear but the master considers that the dispute is not one for summary determination he may order that an issue between the claimants be stated and tried, or, in a proper case, he may refer the matter to an arbitrator or official referee.

The order directs which of the claimants is to be plaintiff on the issue and which defendant, and provides for the disposal of the subject-matter pending the trial of the issue, the form of the issue, its preparation, and the place and mode of trial. Where the grounds of the claimants' claims are likely to be complex the order may direct that pleadings be served between them; otherwise pleadings will be dispensed with, but it is not uncommon to give directions as to the discovery and inspection of documents and interrogatories. In a sheriff's interpleader the claimant is always the plaintiff in the issue."

Respondents conceded that under English law a bill of lading gives a good title but subject to the usual defence. However, she submitted that English law did not apply.

Where a ship or her cargo was to be seized the proper procedure would seem to be by way of arrest. Rules 16 and 17 of Order 5 and Order 29 of our Rules of Supreme Court may be relevant. This matter of execution is of particular importance and interest to those concerned in shipping and other related businesses. I am inclined to agree that the goods in this particular case were not properly seized as a result of the action of "Wiel Bros." who may be liable to "Bangkok Bank" for damages if they succeed in establishing their rights to the goods. The application of appellant was mainly for leave to intervene. The proper way to contest ownership is by way of interpleader proceedings. Therefore, with respect, I agree with the learned judge that the best way to determine the question of ownership of the goods would be under the interpleader summons. Since the goods had been sold the effect of the various orders made by the learned judge would seem to have been spent. But, his orders making "Bangkok Bank" plaintiffs and "Wiel Bros." defendants and asking them to file statement of claim and defence would stand. So also is the order giving the parties liberty to apply and costs in the cause.

Accordingly, I would dismiss the appeal with costs.

Ali Ag. C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal dismissed.

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